

BOARD OF APPEALS CASE NO. 110
APPLICANT: Waters Edge Properties LLC
REQUEST: Rezone 4.946 acres from
R4, Urban Residential, to CI, Commercial
Industrial; Bata Boulevard, 4501 Pulaski
Highway, Belcamp
HEARING DATE: March 15, 2000

* BEFORE THE
* ZONING HEARING EXAMINER
* OF HARFORD COUNTY
* Hearing Advertised
* Aegis: 1/26/00 & 2/2/00
* Record: 1/28/00 & 2/4/00
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ZONING HEARING EXAMINER'S DECISION

The Applicant, Waters Edge Properties LLC, is requesting that 4.946 acres be rezoned from R4 Urban Residential to CI Commercial Industrial based upon an alleged mistake which occurred in the classification of the property during the 1997 Comprehensive Rezoning process.

The subject property is located on the south side of U.S. Route 40, on Bata Boulevard, Belcamp, to the rear of the old Bata Shoe Building in the area of the old Bata Hotel. It is more specifically identified as Parcels 829, 830, 831, 832 and 61, in Grid F2, on Tax Map 62. The parcel is located in the First Election District and is currently zoned R4 Urban Residential.

Mr. John Dixon, Director of Development for Clark Turner Properties, the developer of the Waters Edge Corporate Campus project, testified that he was the former president of BLC Properties, Inc., the prior owner of the subject property. Mr. Dixon testified that between 1990 and 1997, the subject parcel was actually zoned CI. The property and surrounding parcels contained an old hotel and the Bata Shoe factory building. During that time, Mr. Dixon was attempting to market the Bata Shoe Company site for redevelopment as commercial property with little success. He was unable to attract developers for a commercial or industrial redevelopment project due to the existence of significant areas of wetlands, buffers and water frontage on the property. A decision was made then to attempt to develop the property as an assisted living facility, by converting the existing hotel to a residential project.

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Accordingly, during the 1997 Comprehensive Rezoning process, BLC applied to rezone the property R4, the zoning classification appropriate to the assisted living facility. Mr. Dixon testified that the request and subsequent granting of the R4 zoning was a mistake because it became apparent later on that the old hotel was not salvageable for redevelopment and the location of this particular parcel was not suitable for other residential development. In addition, since the time of the Comprehensive Rezoning, there has been a substantial change in the real estate market in favor of campus-type office buildings and the county government has begun a major redevelopment effort towards commercial projects all along the Route 40 corridor. It has become apparent, according to Mr. Dixon, that the prior zoning classification of the property as CI was the more appropriate classification.

Mr. Clark Turner, president of Clark Turner Companies, the builder and developer of the Waters Edge project, testified that, at the time that his company purchased the subject property, the site contained a six story hotel and several other houses, all of which had been vacant for some time. In addition, the Bata Shoe Company factory was in operation, and there were several other buildings also located on the site. The previous owner had requested the rezoning during the Comprehensive process for the specific purpose of converting the vacant hotel to an assisted living facility. However, following Turner's purchase of the property, it was discovered that due to safety concerns and difficulties with renovation, the hotel needed to be demolished. Mr. Turner testified that, in spite of his attempts to go forward with the assisted living project, the parcel is simply not marketable for any type of residential use. Mr. Turner testified that he owns and is developing all the property around the subject parcel and that there would be no negative impact to any surrounding properties if the parcel is rezoned back to CI. On the contrary, the plan to develop the property as a campus office project will enhance the value of the area and will serve the intent and purpose of the Master Plan which includes redevelopment of the Route 40 corridor.

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Mr. Frank Hertsch, senior vice president for Morris & Ritchie Associates, Inc., was qualified and testified as an expert in civil engineering. Mr. Hertsch testified that the subject property and surrounding parcels contain critical areas which require buffers and involve other limitations and restrictions to protect the waterfront environment. It was his opinion that the property was not suitable for residential development and that the site could not be rearranged for such development without destroying the overall design of the project.

Mr. William Monk, an expert in land planning, testified that it was his opinion that a mistake had been made in the legal sense when the County Council rezoned the property to R4 during the comprehensive rezoning process. First, the Council did not appear to be aware that any proposed residential units in the area would look out over an industrial park. In addition, the Council was under the misapprehension that the old hotel building was a viable building for renovation as an assisted living facility. It was Mr. Monk's testimony that rezoning the property back to CI would correct this mistake and would be consistent with the Master Plan. Mr. Monk testified that the proposed rezoning would reinforce the health, safety and welfare of the public, by providing needed buffers and a transition from commercial uses to the residential area along the waterfront.

Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, testified that, during the 1997 comprehensive rezoning, the prior owner of the property requested that the property be rezoned to R4 from CI in order to convert the existing vacant hotel to a residential assisted living facility. The County Council approved this request based upon the incorrect assumption that the hotel was able to be renovated and redeveloped for such a purpose. It was not until after the Comprehensive Rezoning process was concluded and new owners took possession of the property that it was discovered that the hotel was not salvageable for any residential use. According to Mr. McClune, the Council made a mistake in the legal sense in rezoning the property to R4. Returning the property to a commercial classification would be in conformance with the Master Plan and would allow for better design of the proposed business and commercial park. The parcel is located within a commercial and industrial area and it was Mr. McClune's testimony that CI is a more appropriate zoning for this site.

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Accordingly, the Department of Planning and Zoning recommends approval of the rezoning request. In addition, Mr. McClune noted that the Planning Advisory Board also recommended approval of the Applicant's request. No witnesses appeared in opposition to the request.

CONCLUSION:

The Applicant is requesting a rezoning of the subject property from R4, which was the classification assigned during the 1997 Comprehensive Rezoning, back to CI (which it had been prior to the Comprehensive), based upon a mistake in rezoning by the County Council. The Applicant bases its request upon the argument that the Council was given erroneous information and was under the misapprehension during the Comprehensive that the property was suitable for redevelopment as a residential assisted living facility. The evidence presented by the witnesses in this matter supports this conclusion.

The principles of law regarding rezoning based upon an alleged mistake or a change in the neighborhood are outlined in the case of Boyce v Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). These principles may be summarized as follows:

1. The zoning classification assigned a subject property as part of the last comprehensive rezoning is presumed to be correct.
2. A piecemeal zoning reclassification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.
3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning.
4. There has been a change in the character of the neighborhood since the last comprehensive zoning which justifies the piecemeal zoning reclassification.
4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.
5. However, once an Applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972).

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As the Court stated in *Boyce*:

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established where there is probative evidence to show that the assumptions or premises relied upon the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Bonnie View Club v. Glass, 212 Md. 16, 52-53, 217 A. 2d 647, 651 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n., 236 Md. 106, 112, 116-18, 121-22, 202 A. 2d 612, 615, 617-18, 620-21 (1964); Overton v. County Commissioners, 255 Md. 212, 216-17, 170 A. 2d 172, 174-76 (1961); see Rohde v. County Board of Appeals, 234 Md. 259, 267-68, 199 A. 2d 216, 218-19 (1964). Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect."

25 Md. App. At 50-51, 334 A.2d at 142-43.

In the case at hand, the overwhelming evidence supports the fact that the Council was given erroneous information during the 1997 Comprehensive Rezoning process and was under a misapprehension that the property was suitable to be classified as R4. Subsequent to the rezoning, it was discovered that, not only was the hotel not salvageable, but there did not appear to be any viable residential use for the property at all. Thus, the Applicant met its burden to show that a mistake did occur in the prior rezoning. In addition, the evidence has demonstrated that a reclassification of the subject property to Commercial Industrial is in accord with the Master Plan, is consistent with zoning classifications in the area, and will not result in any impairment of the public health, safety or welfare if the request is approved.

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Accordingly, it is the finding of the Hearing Examiner that the Applicant has met its burden of proof to justify the requested rezoning based upon the principle of mistake. The uncontradicted evidence demonstrates that a mistake occurred in rezoning the subject property to R4 during the 1997 Comprehensive Rezoning, and thus the presumption of correctness of that classification is overcome. There is no evidence to show that a denial of the rezoning would promote the public health, safety or welfare. To the contrary, the evidence is overwhelming that the public health, safety and welfare will be preserved and promoted by rezoning the property Commercial Industrial.

It is, therefore, the recommendation of the Hearing Examiner that the Applicant's request to rezone 4.946 acres from the R4 Urban Residential to the Commercial Industrial CI classification be approved due to a mistake in the 1997 Comprehensive Rezoning.

Date March 31, 2000

Valerie H. Twanmoh

Valerie H. Twanmoh
Zoning Hearing Examiner